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(10)

No. 06-340*

In the

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, et al.,

Petitioners,

v.

DEFENDERS OF WILDLIFE, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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* This case is consolidated with No. 06-549.

QUESTIONS PRESENTED

1. Whether Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2), which requires each federal agency to insure that its actions do not jeopardize the continued existence of a listed species or modify its critical habitat, overrides statutory mandates or constraints placed on an agency's discretion by other Acts of Congress.

2. Whether the court of appeals correctly held that the Environmental Protection Agency's decision to transfer pollution permitting authority to Arizona under the Clean Water Act, *see* 33 U.S.C. § 1342(b), was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2); and, if so, whether the court of appeals should have remanded to the Environmental Protection Agency for further proceedings without ruling on the interpretation of Section 7(a)(2).

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Under Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner National Association of Home Builders. Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

PLF was founded over thirty years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates limited government, individual rights, and free enterprise. PLF has litigated numerous cases addressing the need for a balanced approach to environmental regulation, and PLF attorneys were counsel of record in *Rapanos v. United States*, 126 S. Ct. 2208 (2006), decided by this Court last Term.

PLF's analysis of the interplay between the relevant provisions of the Endangered Species Act and Clean Water Act will provide a valuable and necessary viewpoint to assist the Court in resolving the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the scope of the duty to avoid jeopardy to listed species, imposed upon all federal agencies by Section 7(a)(2) of the Endangered Species Act. The extent of that duty is dictated by the plain meaning of Section 7(a)(2), further clarified through sound canons of construction. Section 7(a)(2) applies only to discretionary federal actions. It

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

provides a rule of prioritization for all federal agencies, directing them to conduct their statutorily mandated duties in a manner best suited to avoid jeopardy to protected species, *provided that such activity is consistent with their pre-existing duties*.

Here, the Administrator of the Environmental Protection Agency (EPA) determined that the State of Arizona had met all nine criteria necessary to the transfer of permitting authority under the National Pollutant Discharge Elimination System (NPDES), pursuant to Section 402(b) of the Clean Water Act. To hold that the Administrator's determination was flawed because it was inconsistent with the dictates of Section 7(a)(2) of the Endangered Species Act would ignore the latter provision's plain meaning, improperly refuse to accord deference to the relevant agency's regulatory interpretation of the scope of Section 7(a)(2), and do violence to the canonical admonition that subsequently enacted "general" statutory provisions do not implicitly amend existing "specific" statutory provisions.

ARGUMENT

I

SECTION 7(a)(2) OF THE ENDANGERED SPECIES ACT DIRECTS AGENCIES TO USE THEIR *EXISTING* AUTHORITY TO AVOID JEOPARDIZING SPECIES, WITHOUT PROVIDING ADDITIONAL AUTHORITY TO ACCOMPLISH THAT END

Under Section 7(a)(2), federal agencies must insure that no action jeopardizes the continued existence of a listed species or destroys or adversely modifies a species' critical habitat. *See* 16 U.S.C. § 1536(a)(2). By its plain terms, Section 7(a)(2) applies only to those actions over which the agency has some measure of discretionary control. Therefore, the Section 7(a)(2)

duty does not apply to agency action mandated by separate statute. And even if this interpretive result were not compelled by the plain meaning of the text, it would follow as a matter of judicial deference to agency regulatory interpretation.

A. Under a "Plain Meaning" Analysis, Section 7(a)(2) Applies Only to Discretionary Federal Actions

The process of judicial construction of statutes begins and generally ends with the text of the statute, where that text is clear. *See, e.g., BP Am. Prod. Co. v. Burton*, 127 S. Ct. 638, 643 (2006) ("Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning."). To flesh out the meaning of any given text, and as part of the plain meaning analysis, the Court may rely upon canons of interpretation. *See Chickasaw Nation v. United States*, 534 U.S. 84, 85 (2001) (canons assist in determining legislative intent). In this instance, the plain meaning of Section 7(a)(2), in combination with the canon against implied amendment of statutes, requires that Section 7(a)(2) be interpreted as applying only to discretionary federal agency action.

Under Section 7(a)(2), a federal agency must "insure" that none of its actions causes jeopardy. *See* 16 U.S.C. § 1536(a)(2). The ordinary and natural meaning of "insure" is, as the Ninth Circuit recognized, "'[t]o make certain, to secure, to guarantee (some thing, event, etc.).'" *Defenders of Wildlife v. EPA*, 420 F.3d 946, 963 (9th Cir. 2005) (quoting VII *The Oxford English Dictionary* 1059 (2d ed. 1989)). That definition, however, presents a difficulty. An agency can only make certain or guarantee an outcome over which it has some measure of control. If an agency has no authority to direct a particular result, then it cannot in any fair sense of the word "insure" that such result will transpire. Thus, if an agency is congressionally mandated to do *X*, and if *X* will jeopardize a

listed species's continued existence, then the agency cannot insure that its actions will avoid jeopardy to the species.

Presented with this conundrum, the Ninth Circuit resolved it in favor of the creation of a meta-statutory duty, imposed by Section 7(a)(2), that implicitly amends every federal organic statute, amplifies all existing agency authority, and, to that extent, repeals any contrary directives. In other words, the court's reading grafted Section 7(a)(2) onto every federal statute. *See Defenders of Wildlife*, 420 F.3d at 964-65. Yet a much more plausible resolution, rejected by the court below, would be to interpret Section 7(a)(2) to apply only to discretionary federal actions. According to this interpretation, to the extent that an agency has discretion to fulfill its statutory obligation *X* through choices A or B, and where A would cause jeopardy but B would not, then the agency must select choice B; but if the agency is not authorized to do B, then it must do A notwithstanding its jeopardy implications. This interpretation of Section 7(a)(2) is not only plausible; it is *mandated* by the well-established canon that implied amendments are disfavored.

There can be no question that an interpretation of Section 7(a)(2) requiring federal agencies to craft all their actions so as to avoid jeopardy would effectively amend Section 402(b) of the Clean Water Act. That provision by its own terms requires the EPA Administrator to transfer NPDES permitting authority to a state if that state meets an exhaustive list of nine specified criteria. *See* 33 U.S.C. § 1342(b)(1)-(9). A broad interpretation of Section 7(a)(2) would add a tenth consideration—whether the state can operate the NPDES system without causing species jeopardy—to the existing factors that the Administrator must take into account when making the permitting authority transfer decision. That such a result would obtain was recognized by Judge Berzon, author of the original panel decision. *See Defenders of Wildlife v. EPA*, 450 F.3d 394, 404 n.2 (9th Cir. 2006) (Berzon, J., concurring in the order denying petition for rehearing en banc). But

Section 7(a)(2) nowhere mentions the Clean Water Act or any other federal statute. Thus, the interpretation adopted by the Ninth Circuit produces an implied amendment of Section 402(b).

Under a traditional statutory analysis, this broad interpretation of Section 7(a)(2) cannot stand. The Court normally will not presume that a later-in-time statute impliedly amends a pre-existing statutory duty. *E.g.*, *Blanchette v. Connecticut General Ins. Corps.*, 419 U.S. 102, 133-34 (1974) ("[A] new[er] statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled."); *United States v. Welden*, 377 U.S. 95, 103 n.12 (1964) ("Amendments by implication . . . are not favored."); *United States v. Madigan*, 300 U.S. 500, 506 (1937) ("[T]he modification by implication of the settled construction of an earlier and different section is not favored.").

This approach is bolstered by the complete absence of any expressed congressional intent that Section 7(a)(2) abrogates or amends all conflicting or contrary federal statutory obligations. Presumably, Congress could easily have achieved that end through one of two means. First, Congress could have provided that, "notwithstanding any law to the contrary, federal agencies shall insure that none of their actions jeopardizes a listed species." Second, Congress could have dropped the reference to "insure" (which implies a measure of control over the effects of the activity) and simply have directed that "no federal agency shall jeopardize a listed species." Instead of these options, Congress chose to condition the jeopardy-avoidance obligation principally by imposing that responsibility within the existing framework of federal agency duties, and by intimating that the responsibility is dependent to some degree on the agency having control over its actions. In the absence of any textual indication to the contrary, the irresistible conclusion is that Section 7(a)(2) does not alter any of the existing substantive and mandatory

obligations of federal agencies; and, furthermore, that Congress did not add any criteria to the requirements for NPDES permitting authority transfer set forth in Section 402(b).

B. Principles of Deference to Agency Interpretation of Statutes Require That the Court Defer to the Secretary of the Interior's Determination That Section 7(a)(2) Applies Only to Discretionary Federal Agency Action

Where a given statutory provision is susceptible to more than one reasonable interpretation, this Court will defer to a reasonable interpretation offered by the agency charged with administration of the statute in question. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984). In this case, the Secretary of the Interior, through the United States Fish and Wildlife Service, has interpreted Section 7(a)(2) to "apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. That interpretation is entitled to *Chevron* deference.

An agency interpretation merits deference if the relevant statutory text is ambiguous and the proffered interpretation is reasonable. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). The Ninth Circuit attempted to avoid the *Chevron* question by interpreting Section 402.03 to be coterminous with Section 7(a)(2)'s application to all actions "authorized, funded, or carried out" by a federal agency. *See Defenders of Wildlife*, 420 F.3d at 969. But that answer fundamentally mischaracterizes the purpose of Section 402.03. That provision does not so much determine what activity counts as agency action but what agency action implicates a federal agency's Section 7(a)(2) jeopardy-avoidance duty, *i.e.*, what

type of action requires that the agency "insure" that jeopardy does not ensue.[2]

Properly understood, then, Section 402.03 embodies the responsible agency's answer to the question of how far the jeopardy-avoidance duty of Section 7(a)(2) extends. That answer merits this Court's deference if Section 7(a)(2) is ambiguous, and if the interpretation is reasonable. Amicus believes that the use of the word "insure" is not ambiguous because its plain meaning, fleshed out through canons of statutory construction, indicates that Section 7(a)(2) applies only to discretionary actions. But assuming *arguendo* that "insure" is ambiguous, and that the agency must then choose between a broad and narrow conception of Section 7(a)(2), the latter interpretation is unquestionably reasonable, given that it provides independent meaning to Section 7(a)(2) without producing the implied meta-statutory amendment which results from the interpretation adopted by the lower court.

Accordingly, whether the Court interprets Section 7(a)(2) through traditional plain meaning and canonical methods, or instead applies a *Chevron* analysis, the answer is the same: Section 7(a)(2) does not apply to nondiscretionary federal agency action. And because Section 402(b) mandates that the EPA Administrator transfer NPDES permitting authority to a qualifying state without mention of the Endangered Species Act, that transfer must be completed upon completion of the nine conditions, the implications for listed species notwithstanding.

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[2] The Ninth Circuit did not address that aspect of the problem because it held that Section 7(a)(2) provides independent power to federal agencies to fulfill their jeopardy-avoidance obligations; and thus, in the lower court's view, there is no need to read "insure" restrictively. *See Defenders of Wildlife*, 420 F.3d at 963-67.

II

EVEN IF SECTION 7(a)(2) OF THE ENDANGERED SPECIES ACT PROVIDES INDEPENDENT AUTHORITY TO FEDERAL AGENCIES TO AVOID SPECIES JEOPARDY, THE SPECIFIC COMMAND OF SECTION 402(b) OF THE CLEAN WATER ACT TRUMPS ANY GENERAL COMMAND OF SECTION 7(a)(2) THAT IS TO THE CONTRARY

For the reasons stated in the previous section, Amicus contends that Section 7(a)(2) provides no independent authority to federal agencies, and thus of necessity applies only to discretionary federal actions. But if this Court should interpret Section 7(a)(2) to provide such authority, Amicus contends that the general command of Section 7(a)(2) must yield to the specific command of Section 402(b).

A traditional canon of statutory exegesis is that "specific" statutory provisions prevail over "general" provisions. *See, e.g., Edmond v. United States*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs."); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("As always, where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") (internal brackets, emphasis, and quotation marks omitted); *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) ("[I]t is familiar law that a specific statute controls over a general one without regard to priority of enactment.") (internal quotation marks omitted).

> "The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the

> subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all."

Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) (quoting Theodore Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 98 (2d ed. 1874)).

In 1972, Congress specifically provided nine exclusive criteria as conditions to the transfer of NPDES permitting authority to the states under Section 402(b). *Defenders of Wildlife v. EPA*, 450 F.3d at 402 (Kleinfeld, J., dissenting from denial of rehearing en banc). Shortly thereafter, Congress generally provided in Section 7(a)(2) for a federal administrative obligation to avoid actions that would jeopardize protected species. The former provision sets forth precise bases for authorizing a particular activity, the transfer of NPDES authority, by a particular federal actor, the EPA Administrator. In contrast, the latter provision sets forth at the highest level of generality possible (because it is applicable to all federal agencies) a duty, not specific to any particular activity, to refrain from jeopardizing species. Section 402(b) is thus more "specific," within the meaning of the canon, than Section 7(a)(2).

Of course, merely because the one provision is more specific does not necessarily mean that it will trump the general. As noted above, the general can control the specific if "absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all." But here the circumstances do not implicate that exception. Section 7(a)(2) retains considerable meaning even if it cannot preclude the transfer of NPDES permitting authority; for it

applies to every discretionary federal activity, regardless of type, and makes the avoidance of agency-caused species jeopardy the *highest* discretionary priority of federal agencies. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174, 194 (1978). Accordingly, interpreting Section 402(b) as trumping Section 7(a)(2) in no way renders the latter a nullity; and thus the canon in favor of specific over general provisions applies with full vigor.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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